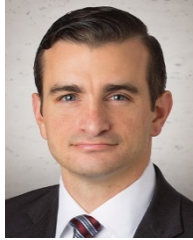


Looking to Sell? Pre-Sale Considerations and Strategies to Avoid State Tax Pitfalls

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Presenters



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Agenda

- Overview of the M&A Process
- Planning the Transaction
- Addressing Tax Risk in the M&A Process

Overview of the M&A Process

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- Letter of Intent
- Due Diligence
- Purchase Agreement
 - Representations and Warranties
 - Tax Covenants
 - Increasingly Buyers are seeking the right to pursue VDAs
 - Indemnification
 - Escrows
- Rep and Warranty Insurance/Tax Insurance

Planning the Transaction

Planning the Transaction

- Understanding the Relevant Tax Types
 - Federal Income
 - Sales/Use
 - State Income/Franchise
 - Gross Receipts
 - Real/Personal Property
 - Employment/Withholding
 - Business Licenses
 - Escheat/Unclaimed Property

Planning the Transaction

- Stock v. Asset Deal and Timing of Sale
 - Federal Income Tax Considerations
 - State Income Tax: Nonresident Taxation Income
 - Stock Deal: Taxable in state of domicile
 - Asset Deal (incl. 338(h)(10)): Gains apportioned and allocated to multiple states
 - Residency
 - Gains from stock sale taxed in state of domicile
 - Gains from asset sale assigned, allocated, and/or apportioned among states

Planning the Transaction

- Sales/Use Tax
 - Overview of Occasional/Isolated Sale and Bulk Sale Exemptions
 - “All” or “Substantially All”
 - What is covered v. excluded
 - Inventory
 - What code section is the deal happening under?
 - Entire entity? Entire Division?
 - Tax clearance certificates and liability
 - Notice Requirements

Planning the Transaction

- Successor liability considerations
 - Sales and Use Tax
 - Escheat/Unclaimed Property
- Restructuring the Organization
 - Utilizing Tax Attributes Pre-Sale
 - Ease of Transition
 - Mitigating Risk
 - Impact on Relevant Employees
- Importance of Modeling
 - Understanding cost/benefit of alternative structures to Buyer and Seller

Planning the Transaction

- Identifying Tax Risk
 - Nexus Evaluation
 - Physical Presence
 - Affiliate/Agency/Click-Thru
 - Economic Nexus
 - Mobile Workforce
 - PL 86-272
 - Over-Reporting/Under-Reporting

Planning the Transaction

- Evaluating & Quantifying Tax Liabilities
 - Sales/Use Tax
 - Historical Purchases
 - Impact of non-filing in states where nexus exists
 - Conduct a review of purchases to discover over/under payment of sales tax to vendors and use tax self-assessed
 - Historical Sales
 - Impact of non-filing in states where nexus exists
 - Review product taxability to ensure accuracy and identify areas of potential exposure

Planning the Transaction

- Evaluating & Quantifying Tax Liabilities
 - Income/Franchise Tax
 - Business/Non-Business Income
 - Unitary Analysis
 - Allocation
 - Apportionment
 - Gross Receipts Tax
 - Impact of Intercompany Transactions

Addressing Tax Risk in the M&A Process

Addressing Tax Risk in the M&A Process

- Assess nexus/tax liabilities up-front (consider attorney-client privilege)
- Memoranda
 - Document any areas of potential tax controversy and the rationale for the approach taken
 - Consider drafting memoranda surrounding successor liability so the issues is vetted prior to buyer conducting diligence

Addressing Tax Risk in the M&A Process

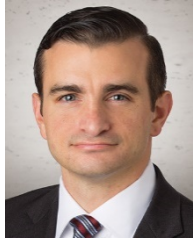
- Voluntary Disclosure
 - Most states allow inquiries and applications on an anonymous basis
 - Utilize attorney/client privilege to protect confidentiality
 - Disclose only what is necessary
 - This is a negotiation – ask for what you want (lookback period, penalties, interest)
 - Consider initiating/completing pre-deal so you control the process
 - Buyers have little risk to own liability moving forward when escrow will cover the liability if resolved within the escrow period
 - Seller can resolve large liabilities, and negotiate escrow v. purchase price reduction for smaller liabilities

Addressing Tax Risk in the M&A Process

- Purchase Agreement Considerations
 - Unpaid taxes for pre-closing period are generally seller's responsibility
 - Specific covenant obligations and related indemnity need to define specific requirements
 - Buyers often push for special escrow or holdback to cover potential tax liability
 - Simultaneous sign and close v. sign and close later upon cleanup
 - Will there be a voluntary disclosure process and who controls it?
 - Buyer will seek control
 - Have seen instances where Seller controls and certifies to Buyer post-close that it is complete
 - Potential to obtain insurance to mitigate risk of tax claims

Thank You!

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